Supreme Court, U.S.
FILED
JUN 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-110
No.

IN THE

Supreme Court of the United States

RANDY TERRY, Petitioner,

-against-

THE PEOPLE OF THE STATE
OF NEW YORK, Respondent.

PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

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Dated: Albany, New York
June 3, 1987

QUESTIONS PRESENTED

1. Is a defendant in a criminal action deprived of a fair trial when the court refuses his request to charge the jury as to the legal basis for his only theory of defense?

2. Does *Roe v. Wade*, 410 U.S. 113 (1973) continue to command a majority of this court?

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

No.

RANDY TERRY,

Petitioner,

—against—

THE PEOPLE OF THE STATE
OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Petitioner, Randy Terry, prays that a Writ of Certiorari issue to review the judgment of the New York State Court of Appeals, entered March 11, 1987.

JURISDICTION

The Certificate Denying Leave of the Hon. Judith S. Kaye, Associate Judge of the Court of Appeals of the State of New York, pursuant to Section 460.20 of the Criminal Procedure Law of the State of New York (1a) was entered March 11, 1987. The jurisdiction of this Court rests on 28 U.S.C. 1257 (3). The time in which to file this petition has been extended to and including June 9, 1987.

OPINIONS BELOW

The only opinion rendered in the Courts of the State of New York is the opinion of the Hon. Patrick D. Monserrate, County Court Judge, Broome County, dated January 23, 1987 (2a) on appeal from Petitioner's judgment of conviction after a jury trial of Criminal Trespass in the Third Degree, Penal Law of New York, Section 140.10, on July 18, 1986.

STATUTES INVOLVED

The statutes of New York which are involved in this petition, and which are reproduced in the Appendix, consist of certain provisions of the New York Penal Law, 140.10, (criminal trespass); 140.00, subd. [5] (definition of "enter and remain unlawfully"); 125.05 (3), 125.40, 125.45 (abortion statutes and definition of "person"); 35.05 (justification).

STATEMENT OF THE CASE

Petitioner is one of six defendants who were tried together in a jury trial of a charge of Criminal Trespass in the Third Degree. See New York Penal Law, 140.10. It was undisputed at the trial that the six defendants nonviolently entered the waiting room of an abortion clinic and did not leave until the police of the City of Binghamton arrived and escorted them from the premises after placing them under arrest.

All of the defendants except Petitioner were acquitted by the jury. This was apparently due to various failures of proof beyond a reasonable doubt of one or more of the elements of the crime of criminal trespass as defined under New York law. The most common failure of proof was on the requirement that the order to leave be "personally communicated" to the defendants. However, the order to leave *was* personally communicated to the Petitioner because he was recognized by the abortion clinic attendant and there was no dispute as to this fact.

Petitioner testified on his own behalf that his *only* defense under the New York criminal trespass statute was that the order to leave was not a "lawful order". See New York Penal Law 140.00, subd. [5]. Petitioner explained to the jury in his testimony that the order was based upon *Roe v Wade* and was not "lawful" because of the failure of that decision to address the human life question. In essence, the clinic could not lawfully ask that he leave when they were knowingly

terminating individual human lives by abortion.

Petitioner's testimony as to his reasoning was admitted in evidence at trial but the trial court refused his request to charge the decision of New York's highest court that the unborn terminated in abortions were living human beings, *viz., Byrn v. N.Y.C. Health & Hospitals Corp.*, 31 N.Y. 2d 194 (1972), appeal dismissed for lack of a substantial federal question, 410 U.S. 949 (1973). Petitioner was thus deprived of an integral part of his only theory of defense and of due process of law. In New York, defense counsel is not permitted to refer during summation to matters of law which the trial court has refused to charge.

Petitioner was convicted as charged and sentenced to 60 days imprisonment. He completed service of sentence prior to filing this petition.

Petitioner's arguments in the City Court of the City of Binghamton, Broome County, New York; on appeal in the County Court, Broome County (2a to 9a) and in his criminal leave application to the Hon. Judith S. Kaye, Associate Judge of the New York State Court of Appeals (1a), all sought to challenge on direct appeal from his conviction the continued viability of *Roe v. Wade*.

Petitioner requested each State court, beginning with his motion pursuant to Criminal Procedure Law 330.30, to decline to follow *Roe v. Wade* because it failed to address the human life issue and because, *after* conviction on May 28, 1986 but *before* sentencing on July 18, 1986, Chief Justice Warren Burger became the fourth justice of this Court to vote to reconsider *Roe v. Wade*. See *Thornburgh v. American College of Obstetricians and Gynecologists*, U.S. 106 S. Ct. 2169, at 2190 to 2192 (decided June 11, 1986).

One of the significant purposes of Petitioner's direct appeal from his conviction was and is to bring *Roe v. Wade* and *Bryn v. N.Y.C. Health & Hospitals Corp., supra*, back before this Court so that it may have an opportunity to reconsider its decision to decline to address the question of the existence of individual unborn human life at the time an abortion is performed.

In this regard, the argument made in the New York State Court of Appeals by the prosecution on behalf of the State of New York seems to illustrate the compelling need for this Court to now consider the human life question which it left undecided in 1973. The argument, made in a letter dated March 2, 1987, by Assistant District Attorney Rita Connerton to the Hon. Judith S. Kaye, in opposing the Petitioner's criminal leave application, was as follows:

> "Abortion is specifically authorized by New York State Laws whether or not a fetus less than twenty-four weeks

is considered to be human life (Penal Law 125.05 (3), 125.40, 125.45)."

In the only opinion in the New York Courts, the Hon. Patrick D. Monserrate of the County Court of Broome County, apparently accepted that argument and held that:

"... a jury instruction that 'a fetus is human life' was equally irrelevant to the issues at the trial, and the request to so charge was properly denied." (9a)

On April 30, 1987, the Hon. Thurgood Marshall, Associate Justice of the Supreme Court of the United States, extended the time for the filing of the within petition for writ of certiorari to and including June 9, 1987.

REASONS FOR GRANTING THE WRIT

The reasons for granting a properly presented writ of certiorari seeking reconsideration of *Roe v. Wade* have not changed since 1972-1973. It is our nation and the majority of this Court that are slowly changing. The question is not *whether* to grant this or a similar writ but *when*. It is respectfully submitted that the time has now arrived.

Former Chief Justice Burger, who became the fourth member of this Court to suggest such reconsideration, as pointed out and argued in the courts below by the petitioner, RANDY TERRY, now presides over the national celebration of the bicentennial of our national constitution. Yet the application of our national constitution to the issue of human abortion was first addressed in an opinion of this Court in 1973.

The leaders of the *Roe v. Wade* majority, Justices Marshall, Brennan and Blackman, have all recently addressed the historical relevance of constitutional development in speeches widely reported in the public press. The gradual development and expansion by this Court of civil and political rights over many generations has been their theme. Just a few weeks ago, Justice Marshall reminded the nation how long the promise of human dignity for all Americans remained unfulfilled. Yet the question of *when* human dignity must *first* be recognized in the life of an individual was left *open* by the majority in *Roe v. Wade*.

Every human individual, recognized by the law as such, is a natural person under the national constitution, as amended to the date of this Court's decisions in *Roe v. Wade* and *Doe v. Bolton*. The existence or non-existence of a human individual in a given case, such as the case at bar, is therefore a question of constitutional

fact. This Court would not have achieved a majority in *Roe v. Wade* if that question of constitutional fact had not been left for another day. And if the human life question *were* to be considered by this Court in the case at bar, it is not clear from the prior decisions of this Court that more than a plurality opinion would result.

The public at large is not aware of the intolerable situation that such a vacuum in the recognition of human dignity creates. The man in the street does not even know the question was left open by the Court's alleged "majority". But this Court is aware and the medical and legal professions are aware that a majority with respect to one-half of the most important case in the history of this Court is not a true majority at all. And the effect of the moral and ethical leadership thereby conveyed has been felt in both professions and throughout the nation. This Court has been widely imitated and followed in its toleration of the *lack* of guidelines or constitutional fact-finding with respect to the existence or non-existence of legally recognized human life before birth.

What has resulted from all this is a constitutional absurdity. It is now argued that constitutional fact-finding by lower courts with respect to the existence of human life before birth is constitutionally impermissible under *Roe v. Wade* or, as stated by the court in the case at bar, "irrelevant" (9a).

Law, as Americans know it, presumes the existence of one or more human individuals and both logic and experience require that the protection of law extend in some form to all human individuals within our nation's jurisdiction. To decline to review questions of constitutional fact dealing with the existence of human life does not call into question the existence of life but the efficacy of the nation's law.

In 1973, this Court's majority opinion held that it was "too early" to determine the question of constitutional fact presented in that case by the Texas Attorney General, the question of whether an unborn human individual was protected by the Texas statutes regulating the medical procedure known as abortion.

In 1987, ethical and moral concerns threaten the nation's viability and the urgency at hand is to provide respected leadership before it is "too late". No one questions the degree of courage it will take for each member of this Court to confront the questions of constitutional fact and laws concerning (i) whether human individuals, within the definition of law, exist prior to birth and (ii) to again confront the questions previously addressed by this Court in *Dred Scott v. Sanford*, 19 How. 393 (1857), i.e., whether there are human individuals within our nation's jurisdiction whose basic rights are unprotected

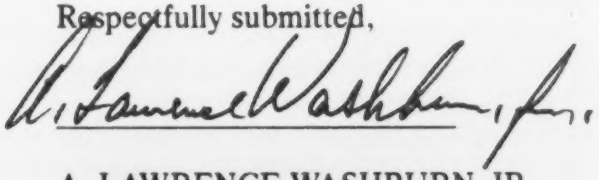
by our nation's law. The eyes of the entire nation and those of the world will turn to this Court as soon as it decides to take up these questions. They are adjudicative questions which belong distinctly to the judiciary and the time to take them up is now.

CONCLUSION

In order for the integrity of the nation to be maintained by this Court with respect to issues bearing upon basic human rights, at least four justices must vote in favor of granting certiorari to review the human life issue, either directly or through the appointment of a special master. Since former Chief Justice Warren Burger concurred in the judgment in *Roe v. Wade* and became the fourth justice to call for reconsideration of that decision, he would be an appropriate candidate to serve in the capacity of special master to examine into the human life issue as it pertains to human abortion.

Dated: Albany, New York
June 7, 1987

Respectfully submitted,



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APPENDIX

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. JUDITH S. KAYE, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK
Respondent,

against
RANDY TERRY,
Appellant.

CERTIFICATE DENYING LEAVE

I, JUDITH S. KAYE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied, and motion for a stay denied as academic.

Dated at New York, New York
March 11, 1987
S/ Judith S. Kaye
Associate Judge

*Order of the County Court, Broome County, dated January 23, 1987, affirming a judgment of City Court, City of Binghamton rendered on July 18, 1986.

STATE OF NEW YORK
COUNTY COURT:: BROOME COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

—v—

DECISION AND ORDER

RANDY TERRY, Index No. N-997

Defendant-Appellant

PATRICK D. MONSERRATE, J.

The defendant-appellant seeks review by this Court of the July 18, 1986, judgment of the City Court of the City of Binghamton (Vitanza, J.), convicting him, following a jury trial on May 28th, for the misdemeanor crime of Criminal Trespass in the Third Degree [Penal Law §140.10].

On January 30, 1986, the appellant and five others entered the waiting room of Southern Tier Women's Services, Inc., wherein was located the office of Dr. Salomon Epstein, a physician specializing in gynecology and obstetrics. Their purpose was to convince patients whom they met there not to have abortions. Upon seeing the group enter the waiting room, Alexandra Aitken, the Assistant Administrator of the office, recognized the appellant, came into the waiting room from her office, and announced that the new entrants were trespassers and that she was going to call the police. She then approached the appellant and said: "You are trespassing. If you don't leave, I am calling the police." (Trial Transcript, p. 27). He didn't, she did, and the six were arrested. The jury acquitted all but the appellant of the ensuing criminal trespass charge.

Prior to the trial, an oral motion to dismiss the information was made by the defense on the ground that the information and its supporting deposition did not establish that the direction to leave the premises was made by a person authorized to make such order, thereby rendering the accusatory instrument insufficient on its face and thus jurisdictionally defective. The precise basis for this claim was that the supporting deposition did not establish that the chain of authority to issue such order ran from the tenant or subtenant of the leased premises to the employee who issued it. In denying the motion, the trial court ruled that the allegations in the

supporting deposition were sufficient and that further proof as to Ms. Aitken's authority was for trial.

At trial, the appellant testified that he knew who Ms. Aitken was, and had seen her and Peg Johnston, the Administrator, one hundred to one hundred fifty times [“...it's almost like going to work together in a weird sort of way” (Trial Transcript, p. 197)]. He then testified that she had no authority to tell him to leave because he was there to stop the killing of babies, while she was an accomplice to their destruction (Trial Transcript, p. 200).

ISSUES RAISED AND DETERMINED

I) Whether the information used as the accusatory instrument to charge the appellant was facially sufficient to have given the City Court jurisdiction over the subject matter of the action.

The subject information, supplemented by the annexed supporting deposition by the witness Aitken, was adequate to satisfy both the statutory requirements for such documents [CPL§§100.15; 100.40 (1)] as well as the tripartite constitutional due process function of such a pleading, viz: to inform the accused of the nature of the charge against him, to provide him with adequate information as will enable him to defend against it, and to sufficiently delimit the facts and circumstances of the present charge so as to protect him from twice being placed in criminal jeopardy for the same conduct [*People v Miles*, 64 NY2d 731 (1984)]. *1*

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1 As the Assistant District Attorney points out on behalf of the People, the City Court would have been procedurally correct in denying appellant's pretrial motion to dismiss the information for his counsel's failure to comply with the statutory requirements that such motions be made in writing and on prior notice to the People [*People v Key*, 45 NY2d 111 (1978)]. However, contrary to her corollary assertion, such a failure would not have resulted in a waiver of the right to raise such insufficiency as an appellate issue *if* the information had in fact been jurisdictionally defective [*People v Case*, 42 NY2d 98 (1977); *People v Hall*, 48 NY2d 927 (1979)].

II) Whether reversal of the appellant's conviction (and the concomitant dismissal of the information) is required by any failure of the People to have proved beyond a reasonable doubt that the direction for him to leave the subject premises was a “lawful order” [PL §140.00 (5)].

The trial evidence was more than ample on the issue.

The legislative intent clearly requires that the person issuing the "order" not to enter or to leave premises be one who is authorized to issue such a direction. In the case at bar, appellant's counsel does not dispute the fact or evidence of Ms. Aitken's legal authority to have told the appellant to leave.

Rather, counsel asserts a transcending absence of moral right for *anyone* to have ordered the appellant from the office since the benign purpose for his presence was to prevent what he perceived to be an intolerable moral wrong being perpetrated there: The abortional termination of actual or potential human life — albeit specifically authorized by state laws [Penal Law §§125.05(3); 125.40; 125.45] and currently sanctioned by favorable judicial interpretations of them [*Roe v Wade*, 93 S.Ct. 705 (1973); *Byrn v New York City Health & Hospitals Corporation*, 31 NY2d 194 (1972)], at both the federal and state levels.

Thus is joined — or sought to be — the timeless confrontation between a legal law of man, imposed on himself through some fallible human process in order to facilitate societal living and a perceived higher moral law which permits — as seen by an individual requires — him to transgress man's law in order to follow God's.

By indirection, the appellant seeks to cloak his criminal conduct with the noble mantel of justification or necessity, i.e., he was justified in ignoring an "unlawful" (in his view) order, and his trespassory conduct was necessary to prevent the imminent death of those fetuses about to be aborted.

It is not that the law of this State does not recognize situations where individuals may — even must — engage in conduct which might otherwise be criminal but because of the particular circumstances (defense of self or others, for example) the conduct may be legitimized or "justified". Even then, the law is careful to circumscribe the circumstances of permissible "unlawful" activity — distinguishing between law and morality.

New York's justification defense is found in Article 35 of the Penal Law. In pertinent part, Section 35.05 reads as follows:

> "...[C]onduct which would otherwise constitute an offense is justifiable and not criminal when:
>
> * * * * * * * * *
>
> 2. Such conduct is necessary as an emergency measure to avoid an imminent public or private injury ... which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of

> avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statue defining the offense in issue. *The necessity and justifiability of such conduct may not rest upon considerations pertaining only to the morality and advisability of the statute,* either in its general application or with respect to its application to a particular class of cases arising thereunder..." [emphasis added].

Clearly, the Legislature has seen fit to reaffirm the doctrine of legislative supremacy by specifically excepting from the operation of this defense those areas of law upon which the Legislature has already passed, but with which the actor disagrees. This exception extends both to the particular statute violated by the actor's conduct, as well as to any statutory disagreements upon which the actor's conduct is predicated. Thus, while the appellant's violation of the trespass statute is not based upon his disagreement with that statute, his argument as to the necessity and justifiability of his conduct in violating that statute is specifically based upon his view of the morality and advisability of the abortion statutes. Accordingly, the Court finds that he is statutorily fore-closed from using that defense to avoid criminal liability for his conduct.

In any civilized society worthy of the name, the means used by individuals or groups to attain or promote their ends — regardless of how noble or desirable these may be — must be consistent with the rule of law, or the result is anarchy. The rule of law must be followed by citizens, it must be enforced by governments, and must be revered by both for what it is: the constitutional fiber of our free society.

There are any number of lawful avenues available through which to make known a person's position in favor of or in opposition to any idea, a practice, or a movement. Some methods enjoy constitutional protection such as the freedoms to speak, to assemble peaceably, and to petition governments for the redress of grievances [U.S. Const. Amend. 1; N.Y. Const., Art. I §§8, 9].

Other means exist within the law and have been demonstrably effective as conduits for social change: the organized lobbying of elected executive and legislative decision-makers, the campaigning for and against issue-oriented candidates for public office, and — more pertinent to the case at bar — the establishment of counseling centers to provide information for willing recipients, rather than to seek to impose the same information on those not asking for it.

However, unlawful trespass against persons or property in the cause of what individuals believe to be "right" are not acceptable

alternatives to compliance with the law, which must be applied for the benefit of all: those who think, act, and believe as we do — and those who do not.

III) Whether the trial court erred in refusing appellant's request to instruct the jury to the effect that "a fetus is human life".

For many of the same reasons discussed in II, *supra,* a jury instruction that "a fetus is human life" was equally irrelevant to the issues at trial, and the request to so charge was properly denied.

CONCLUSION

The judgment of conviction appealed from should be affirmed. It is so ordered.

S/ Patrick D. Monserrate, J.
Broome County Court Judge

Dated: January 23, 1987

STATUTES INVOLVED

140.00 Criminal trespass and burglary; definitions of terms

The following definitions are applicable to this article:

* * * *

5. "Enter or remain unlawfully." A person "enters or remains unlawfully" in or upon premises when he is not licensed or privileged to do so. A person who, regardless of his intent, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless he defies a lawful order not to enter or remain, personally communicated to him by the owner of such premises or other authorized person. A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public. A person who enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, does so with license and privilege unless notice against trespass is personally communicated to him by the owner of such land or other authorized person, or unless such notice is given by posting in a conspicuous manner. A person who enters or remains in or about a school building without written permission from someone authorized to issue such permission or without a legitimate reason which includes a relationship involving custody of or responsibility for a pupil or student enrolled in the school or without legitimate business or a purpose relating to the operation of the school does so without license and privilege.

140.10 Criminal trespass in the third degree

A person is guilty of criminal trespass in the third degree (a) when he knowingly enters or remains unlawfully in a building or upon real property, or a building that is an elementary or secondary school, which is fenced or otherwise enclosed in a manner designed to exclude intruders, or (b) when he knowingly enters or remains unlawfully in a building that is an elementary or secondary school in violation of conspicuously posted rules or regulations governing entry and use thereof or in violation of a personally communicated request to leave the premises from a principal, custodian or other person in charge thereof.

Criminal trespass in the third degree is a class B misdemeanor.

§125.05 Homicide, abortion and related offenses; definitions of terms

The following definitions are applicable to this article:

1. "Person," when referring to the victim of a homicide, means a human being who has been born and is alive.

2. "Abortional act" means an act committed upon or with respect to a female, whether by another person or by the female herself, whether she is pregnant or not, whether directly upon her body or by the administering, taking or, prescription of drugs or in any other manner, with intent to cause a miscarriage of such female.

3. "Justifiable abortional act." An abortional act is justifiable when committed upon a female with her consent by a duly licensed physician acting (a) under a reasonable belief that such is necessary to preserve her life, or, (b) within twenty-four weeks from the commencement of her pregnancy. A pregnant female's commission of an abortional act upon herself is justifiable when she acts upon the advice of a duly licensed physician (1) that such act is necessary to preserve her life, or (2) within twenty-four weeks from the commencement of her pregnancy. The submission by a female to an abortional act is justifiable when she believes that it is being committed by a duly licensed physician, acting under a reasonable belief that such act is necessary to preserve her life, or within twenty-four weeks from the commencement of her pregnancy.

L. 1965, c. 1030; amended L. 1970, c. 127 § 1.

§125.40 Abortion in the second degree

A person is guilty of abortion in the second degree when he commits an abortional act upon a female, unless such abortional act is justifiable pursuant to subdivision three of section 125.05.

Abortion in the second degree is a class E felony.

L. 1965, c. 1030.

§125.45 Abortion in the first degree

A person is guilty of abortion in the first degree when he commits upon a female pregnant for more than twenty-four weeks an abortional act which causes the miscarriage of such female, unless such abortional act is justifiable pursuant to subdivision three of section 125.05.

Abortion in the first degree is a class D felony.

L. 1965, c. 1030.

§35.05 Justification; generally

Unless otherwise limited by the ensuing provisions of this article defining justifiable use of physical force, conduct which would otherwise constitute an offense is justificable and not criminal when:

1. Such conduct is required or authorized by law or by a judicial decree, or is performed by a public servant in the reasonable exercise of his official powers, duties or functions; or

2. Such conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue. The necessity and justifiability of such conduct may not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder. Whenever evidence relating to the defense of justification under this subdivision is offered by the defendant, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a defense.

L. 1965, c. 1030; amended L. 1968, c. 73, §2.